Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 79-5835

WILLIE LEWIS MACK,

Petitioner

v.

STATE OF ALABAMA, Respondent

BRIEF IN OPPOSITION TO PETITION

FOR WRIT OF CERTIORARI

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Comes now the State of Alabama by and through its Attorney General and respectfully asserts that the Petition for Writ of Certiorari is due to be dismissed and that this matter should not be reviewed by this Honorable Court.

STATEMENT OF THE CASE

This case arose from the Circuit Court of Butler County, Alabama after the Petitioner was convicted therein for the offense of "robbery or attempts thereof when the victim is intentionally killed" (Code of Alabama, 1975, Sec. 13-11-2(a)(2). The punishment was set at death.

The appeal of the conviction resulted in affirmance by the Alabama Court of Criminal Appeals after remandment on February 26, 1979. Application for rehearing was denied. The

Alabama Supreme Court granted the Certiorari Petition and heard oral arguments. The case was affirmed on August 24, 1979. Rehearing was denied.

The Petitioner filed a motion to stay execution which was granted by Mr. Justice Powell, Jr. on December 27, 1979.

Thereafter a Petition was filed with this Honorable Court to which this brief is in opposition.

REASONS FOR DENYING WRIT

The Petitioner raises seven basic issues on this attack of the Constitutionality of Alabama's death statute. Those of significance to this Petition are discussed below.

(I) Petitioner contends that Alabama's death penalty statute is unconstitutional because it precludes the trial jury from considering lesser included offenses. On October 9, 1979, this Honorable Court granted certiorari in Gilbert Franklin Beck v. State of Alabama, (United States Supreme Court No. 78-6621). The order granting certiorari read:

> "The petition for a writ of certiorari is granted limited to the question presented by the Court: May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?"

The Beck case has been briefed, and submitted to the Court.

The position of the State of Alabama, and of the respondent in this appeal, concerning the preclusion of lesser included offenses is twofold. First, preclusion of a lesser included non-capital offense in a capital case is not unconstitutional even if the evidence at the trial of the case would support a

conviction for the lesser included non-capital offense. Second, even if it is unconstitutional to preclude a lesser included non-capital offense in a capital case in which there is a factual basis in the evidence for a conviction for that lesser offense, it is not unconstitutional to preclude a conviction for a lesser included offense when no evidence is presented at the trial of the capital case which would support a conviction for the lesser offense instead of for the capital offense.

The first issue described above will be decided by this Honorable Court in Beck v. Alabama, supra. If the Supreme Court decides that issue in favor of the State of Alabama, then the remaining issue described above need not be decided. If the Supreme Court decides the Beck case adversely to the State of Alabama, then the remaining issue will be presented in this case or other Alabama death penalty cases presently before this Court.

(II) The Rule in Non-Capital Cases is That a Jury is Permitted to Consider Lesser Included Offenses Only if There is a Factual Basis in the Evidence for Them

(A) The Federal Rule

As the United States Supreme Court held in Sansome v. United States, 380 U.S. 343, 350 (1965), "A lesser included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser included offense." Accord, e.g., United States v. Madden, 525 F.2d 972, 973 (5th Cir. 1976); United States v. Flint, 534 F.2d 58, 60 (5th Cir.), cert. denied, 429 U.S. 924 (1976). It is neither necessary nor proper to permit a jury to consider convicting a defendant for a lesser offense unless the jury could rationally find that although all the elements of the higher offense had not been

proven all of the elements of the lesser offense had been. E.G., Sansome v. United States, 380 U.S. at 351; Methvin v. United States, 441 F.2d 584, 586 (5th Cir. 1971). The case of Keeble v. United States, 412 U.S. 205 (1973), is not to the contrary, because in that case the defendant's intent to create serious bodily harm was "very much in dispute at trial." 412 U.S. at 213. Since that intent was an element of the higher offense but not of the lesser offense, the Court specifically found that the jury "could rationally" have convicted the defendant of the lesser offense instead of the greater one. 412 U.S. at 213. Absent a factual dispute over the existence of an element necessary only to the higher offense, the result is to the contrary. As the Court said in Sansome v. United States, 380 U.S. at 334-335:

> In sum, it is clear that there were no disputed issues of fact which will justify instructing the jury that it could find that petitioner had committed all the elements of either or both of the (lesser offenses) without having committed a violation of the (higher offense). This being the case, the petitioner was not entitled to a lesser included offense charge . . .

The rule described is the rule which prevails in the federal courts, but the same rule generally applies in Alabama courts.

(B) The Rule in Alabama

> On p. 8 of petitioner's petition, he states that:
>
> As a general principle, Alabama permits a jury to find a criminal defendant guilty of any lesser degree of, or any offense necessarily included in, the crime with which he is charged. Alabama Code, Sec. 15-7-1 (1975).

That is not correct. Under Alabama law, the general rule is that a defendant is not entitled to have the jury consider a lesser included offense unless under a reasonable theory based

upon the evidence the defendant could be guilty of the lesser offense instead of the greater one. E.g., Fulgham v. State, 291 Ala. 71, 277 So.2d 886, 890 (1973) (upholding refusal to instruct on manslaughter in the second degree in a murder case); Kelly v. State, 235 Ala. 5, 1976 So. 807, 808 (1937) (upholding refusal to instruct on larceny and assault and battery in a robbery case); Whitehead v. State, 206 Ala. 288, 90 So. 351, 354 (1921) (upholding refusal to instruct on manslaughter in the first degree in a murder case); Golston v. State, 57 Ala. App. 623, 330 So.2d 446, 449-450 (1975) (upholding refusal to instruct on attempted robbery in a robbery case); Harvest v. State, 342 So.2d 1369, 1372 (Ala. Cr. App. 1977) (upholding refusal to instruct on petty larceny in a grand larceny case); Harris v. State, 44 Ala. App. 654, 219 So.2d 410, 413 (1969) (upholding refusal to instruct on grand larceny in a robbery case); Bowman v. State, 44 Ala. App. 331, 208 So.2d 241, 244-245 (1968) (upholding refusal to instruct on lesser included offenses in a robbery case). These cases also establish that where evidence

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Footnote 10 on p. 8 of petitioner's brief implies that Warren v. State, 197 Ala. 313, 319, 72 So. 624 (1916), held that a jury must always be permitted the option of convicting a murder defendant of manslaughter regardless of whether that lesser included offense is supported by the evidence. As Fulgham v. State, supra, and Whitehead v. State, supra, establish, the law in Alabama is that it is not proper to charge a jury in a murder case on manslaughter unless there is an evidentiary basis for such a charge. Indeed, Warren v. State, supra, itself so holds. The portion of that decision which petitioner cites, 197 Ala. at 319, 72 So. at 626, is from the opinion of Justice Mayfield who dissented. As the last part of the decision indicated, 197 Ala. at 348-349, 72 So. at 638, the majority differed from Justice Mayfield and affirmed the trial court's refusal to charge the jury on manslaughter because there was no evidentiary basis for that lesser included offense.

is undisputed, there can be no evidentiary basis for permitting the jury to consider any lesser included offenses. See, e.g., Harris v. State, 219 So.2d at 413; Golston v. State, supra. [1]

There is one and only one exception to the rule in Alabama that lesser included offenses are to be submitted to the jury only if there is an evidentiary basis to support them. That exception is contained in Code of Alabama 1975, Sec. 13-1-73 which provides that when a jury convicts a defendant under an indictment for murder in the first degree, the jury must be permitted to determine whether the defendant is guilty of murder in the first or second degree. This special statutory rule, which is an exception to the general rule, means that at the trial of a first degree murder indictment the jury must be instructed on and permitted to convict for second degree murder regardless of whether there is a factual basis in the evidence for that lesser included offense.[2] This special statutory rule applies only to murder indictments and not to capital indictments generally. For example, before Furman v. Georgia, 408 U.S. 238 (1972), robbery was a capital crime in Alabama, Title 14, Sec. 415, Code of Alabama 1940 (Recompiled 1958), yet the Alabama courts repeatedly held that it was not proper to permit a jury to consider lesser included offenses in a robbery case unless

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[1] This case law has been codified in Code of Alabama 1975, Sec.13A-1-9(b) (1979 Supp.), which provides that, "The court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense." Section 13A-1-9(b) is part of the new Alabama Criminal Code, adopted in 1977, but applicable only to crimes committed on or after January 1, 1980.

[2] Effective January 1, 1980, section 13-1-73 is repealed and replaced by section 13A-1-9(b) of the new Alabama Criminal Code.

there was some evidentiary basis for convicting on them instead of on robbery itself. E.g., Kelly v. State, 235 Ala. 5, 176 So. 807, 808 (1937); Bowman v. State, 44 Ala. App. 331, 208 So.2d 241, 244-245 (1968).

Even if the last clause in Code of Alabama 1975, Sec. 13-11-2(a), which precludes lesser included offenses in capital cases were to be held unconstitutional and severed from the statute, there would still be no state law requirement that the jury in a capital case be permitted to consider lesser included offenses for which there is no basis in the evidence. Section 13-1-73 would not apply, because that statutory provision is limited by its terms to murder indictments. The Alabama Supreme Court has repeatedly held that the capital felonies which are listed in Code of Alabama 1975, Sec. 13-11-2(a) are not crimes of murder and cannot be described or referred to as murder, or capital murder, or even murder under aggravated circumstances. E.g., Clements v. State, 370 So.2d 723 (Ala. 1979); Watters v. State, 369 So.2d 1262 (Ala. 1978); Jacobs (John L.) v. State, 371 So.2d 448 (Ala. 1978). Therefore, it follows that if the preclusion of lesser included offenses clause contained in Alabama's capital punishment statute is held to be unconstitutional and is severed from the statute, then the law in Alabama will be that a jury in a capital case is to be instructed on and permitted to find lesser included non-capital offenses when and only when the evidence provides a factual basis which would support a conviction on the lesser offense instead of on the capital offense.[3]

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[3] If the preclusion of lesser included offenses raised by the evidence is held unconstitutional in Beck v. Alabama, supra, then the question of the severability of the preclusion clause

Therefore, neither Alabama law nor general federal law requires that a jury be permitted to convict on a lesser included offense if there is no factual dispute in the evidence upon which such a conviction can be based. Nor does federal constitutional law require it.

(III) The Constitution Does Not Require That a Jury in a Capital Case be Permitted to Consider Non-Capital Lesser Included Offenses for Which There is No Basis in the Evidence

There is a significant difference between preventing a jury in a capital case from considering a lesser included offense supported by the evidence and preventing it from considering a lesser included offense which has no basis in the evidence. That difference was recognized by the Supreme Court when it limited its grant of certiorari in Beck v. Alabama, supra, to the constitutionality of not permitting a jury to consider a verdict of guilty on a lesser included non-capital offense "when the evidence would have supported such a verdict." The difference is also recognized by petitioner himself who refers on p. 8 of his brief to the "submission to the jury of lesser included offenses that are supported by the evidence". (Emphasis added.)

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of section 13-11-2(a) will be an issue of Alabama law. E.g., Morey v. Doud, 354 U.S. 457, n. 16 (1957); Dorchy v. Kansas, 264 U.S. 286, 290 (1924). If it is determined as a matter of Alabama law that the preclusion clause is severed and the rest of the statute remains, then whether the special rule of section 13-1-73 applies to capital indictments would also be a question of Alabama law. See, e.g., Ward v. Illinois, 431 U.S. 767, 772 (1977); Mullaney v. Wilbur, 421 U.S. 684, 691 (1975). Therefore, the issue of whether a capital jury must as a matter of state law be permitted to convict on lesser included offenses not supported by the evidence would be a question of Alabama law and not a federal issue. If this state law question should be raised by the outcome in Beck v. Alabama, supra, then certification of it to the Alabama Supreme Court might be appropriate. See, e.g., Bellotti v. Baird, 428 U.S. 132 (1976).

Petitioner did not cite any case, capital or non-capital, which holds that the constitution requires that lesser included offenses be submitted to the jury when there is no factual basis in the evidence for them. Gregg v. Georgia, 428 U.S. 153 (1976), at least implicitly, holds to the contrary. Under the Georgia capital punishment statute upheld in Gregg, "the trial judge is required to charge lesser included offenses when they are supported by any view of the evidence." 428 U.S. at 163. However, the Georgia statute does not require that lesser included offenses be submitted to the jury if they are not supported "by any view of the evidence." The Gregg case is itself an example. Gregg was charged with murder during the course of a robbery. The trial court charged the jury on felony murder, non-felony murder, and on the lesser included offenses of robbery, but it specifically refused to charge on the lesser included offense of manslaughter. 428 U.S. 15 160, 215-216. The Supreme Court expressly noticed that the Georgia Supreme Court had upheld the trial court's refusal to instruct the jury on voluntary manslaughter, "since there was no evidence to support that verdict." 428 U.S. at 161, n. 2 (opinion of Stewart, Powell, and Stevens, J.J.). The Supreme Court upheld the Georgia statute and affirmed the judgment of the Georgia Supreme Court. Therefore, Gregg v. Georgia, supra, establishes that it is not unconstitutional in a capital case to prevent jury from considering lesser included non-capital offenses when there is no evidentiary basis for them.

The Louisiana statute struck down in Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 330 (1976), provided that capital juries must be instructed on the non-capital lesser included offenses of second degree murder and manslaughter "whether or

not raised by the evidence." While this was not the reason the statute was held unconstitutional, 428 U.S. at 332, the Roberts plurality did note that such a requirement "plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate," thereby injecting "an element of capriciousness" and permitting the "arbitrary exercise of the capital jury's de facto sentencing discretion." 428 U.S. at 335 (opinion of Stewart, Powell, and Stevens, J.J.). While the quoted words were spoken in a case involving a mandatory statute, the same concerns exist in regard to the operation of non-mandatory statutes.

According to the latest word from the Supreme Court, in order to comply with Furman, capital punishment procedures should not create "a substantial risk that the death penalty would be inflicted in an arbitrary and capricious manner." Lockett v. Ohio, 438 U.S. 586, 601 (1978) (plurality opinion). Furman requires that sentencing discretion be "directed and limited" so that the death penalty will be imposed in a more consistent and rational manner" and so that there will be a meaningful basis for distinguishing the cases in which it is imposed from the cases in which it is not imposed. Lockett v. Ohio, supra. Permitting the jury in a capital case to convict for a lesser included non-capital offense which has no basis in the evidence will only serve to promote jury nullification and the kind of de facto sentencing discretion which will cause the death penalty to be inflicted in an arbitrary and capricious manner. Instructing a jury to apply the law and decide the case on the basis of the evidence and then giving them a tool which serves no purpose other than to permit them to disregard

the law and evidence is illogical. It does not promote consistent and rational sentencing, but just the opposite. A verdict convicting a defendant of a lesser included offense for which there is no factual basis in the evidence can only be based on caprice or emotion rather than reason. A defendant is not constitutionally entitled to do that.

None of the arguments put forward in petitioner's brief against the preclusion of lesser included offenses supported by the evidence applies to the preclusion of lesser included offenses which have no support in the evidence. Petitioner argues that the preclusion of lesser included offenses denigrates the proof beyond the reasonable doubts standard by encouraging jurors to convict in spite of it. This argument is explicitly premised upon there being at the trial proof beyond a reasonable doubt of a lesser included offense but not of the capital offense itself. That situation, by definition, does not exist in a case like the present one where there is no factual basis for a jury to find that the defendant was guilty of a lesser offense but not of the greater capital offense. Nor does Keeble v. United States, 412 U.S. 205 (1973), support a contrary conclusion. As was discussed previously, in Keeble there was a factual dispute which provided an evidentiary basis for the lesser included offense, and that basis was specifically recognized by the Supreme Court.

Likewise, the equal protection analysis of petitioner yields an entirely different result when applied to the preclusion of lesser included offenses not supported by the evidence. Not permitting a jury to convict on lesser included offenses not supported by the evidence is not only the general rule in Alabama but also in the federal court. It is true that,

until January 1, 1980, Alabama has in effect a special statute requiring that regardless of the evidence juries be instructed on second degree murder in the trial of all non-capital first degree murder indictments. The difference between this rule and the refusal to instruct on lesser included offenses not supported by the evidence in this and other capital cases is justified by the compelling state interest in avoiding jury nullification and promoting consistent, rational and non-arbitrary jury sentencing in capital cases.

Petitioner's 8th Amendment argument is based upon the "uniqueness" of Alabama's preclusion of factually supported lesser included offenses. The rule precluding jury consideration of lesser included offenses not supported by the evidence is not unique. That is the general rule in non-capital cases in this country, and it is the rule in federal courts. Petitioner has cited no cases to validly support the contrary.

The evidence presented at the trial of petitioner, dissimilar to that in Beck, does not factually establish a lesser included offense. Therefore, if Beck is decided adversely to Respondent on the ground upon which certiorari was granted in Beck, such decision would not be dispositive of this case.

CONCLUSION

In concluding the State of Alabama would respectfully note that much of the argument expressed in this brief is adopted from this party's brief to this Honorable Court in Beck, supra and State of Alabama v. Baldwin, submitted on November 27, 1979.

Additionally, we would note that it appears that much of Petitioner's argument seems to be "on the merits" without a discussion of any actual reasons for granting of the writ. Similarly the State of Alabama's brief responds accordingly. We would point out here that no basis has been argued for why the Petition should be granted and therefore we submit it should be denied.

Relatedly, the Petitioner has stated our issue in regard to his right to take the stand without in "argument" being submitted. That issue is therefore not supported to any degree by anything which would justify the granting of this writ.

Based on this argument we respectfully request that the Petition be denied.

Respectfully submitted,

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AFFIDAVIT OF PROOF OF SERVICE

STATE OF ALABAMA MONTGOMERY COUNTY

I, the undersigned, Assistant Attorney General of Alabama, 64 North Union, Montgomery, Alabama, 36130, hereby certify that I have deposited for service three (3) copies of a brief in opposition to petition for writ of certiorari to Honorable J. L. Chestnut, P. O. Box 1305, Selma, Alabama, 36701, and ten (10) copies to the Clerk of the Supreme Court of the United States.

This the 29th day of January, 1980.

Walter S. Turner

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SWORN to and subscribed before me the undersigned, this the 29th day of January, 1980.

Ronda L. Cooper

NOTARY PUBLIC